Supreme Court of the United States

OCTOBER TERM, 1948.

No. 427

FREDERICK W. WADE, PETITIONER,

VS.

WALTER A. HUNTER, WARDEN UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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Petition for Writ of Certiorari to the Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Frederick W. Wade petitions the court for writ of certiorari to review the final judgment based on a majority opinion of the United States Court of Appeals for the Tenth Circuit, entered on September 7, 1948 (R. 107, *Hunter* v. *Wade*, 169 F. 2d 973), reversing the judgment of the United States District Court for the District of Kansas, discharging petitioner on a writ of habeas corpus (R. 26).

Three judges advocate who were members of a statutory Army Board of Review (R. 66-78), the trial court on

habeas corpus (R. 12-26, 72 F. Supp. 755), and the Chief Judge of the court below (R. 102-106, 169 F. 2d 976) held that the second trial by court-martial for the same offense did subject petitioner to double jeopardy in violation of the Fifth Amendment and hence the challenged sentence of the second court-martial was void for lack of jurisdiction to impose it.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The majority opinion of the court below (R. 97-102) determines issues of fact and law, relating to the question of imperious necessity, which did not arise in the court-martial trial which resulted in the denial of petitioner's plea of former jeopardy and his subsequent conviction (R. 119-127, 68-69, 60-62). It determines issues of fact and law on the issue of imperious necessity contrary to the findings of fact and conclusion of law made by the trial court (R. 12-26), and contrary to the dissenting opinion of the Chief Judge of the court below (R. 102-106) sustaining the trial court. Consequently the evidence must be stated with particularity.

This habeas corpus proceeding was initiated by petition to the United States District Court for the District of Kansas whereby petitioner sought discharge from the custody of respondent who held him under court-martial order, the validity of which petitioner attacked on the primary ground that he had been twice placed in jeopardy for the same offense in violation of the Fifth Amendment (R. 2-8, 8-10, 12-13, 33-39).

The proceeding came on for hearing September 28, 1946 (R. 33). The evidence disclosed that the following

proceedings had occurred, resulting in the court-martial order assailed as void.

Proceedings Before the Fifteenth Army General Court-Martial.

Petitioner, a combat member of the 385th Infantry, 76th Division, U. S. Army, was brought to trial before a Fifteenth Army general court-martial at Bad Neuenahr, Germany, on June 30, 1945, on a charge of raping a German woman (R. 66-67). He pleaded former jeopardy and introduced an authenticated record of trial for the same offense before a 76th Division general court-martial (R. 68). This record established that petitioner had been tried at Pfalzfeld, Germany, on March 27, 1945, that the prosecution introduced evidence and rested, that petitioner introduced evidence (the testimony of seven members of the 385th Infantry, 76th Division),[1] and rested, that the court stated it did not desire any witnesses called or recalled, that the case was submitted, that after deliberations, the court announced it desired to hear certain named German witnesses (residents of Krov, Germany), and continued the case until a date fixed by the Trial Judge Advocate (R. 68-69).

The prosecution opposed the plea of former jeopardy on the sole ground that the prior trial before the 76th Division court-martial did not constitute a trial causing jeopardy to attach,[2] and introduced a letter of withdrawal as prosecution Exhibit A (R. 68-69, 119-127). This letter did

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[1]Respondent's Exhibit B, lodged with the court, contains the testimony of the seven members of the 385th Infantry, 76th Division at pages 229-266.

[2]The Trial Judge Advocate's written brief, filed with the court-martial, misstating the law of double jeopardy, appears at page 51 of respondent's Exhibit B.

not contain any reason for the withdrawal of the case and reads as follows:

PROSECUTION EXHIBIT A.

Headquarters 76th Infantry Division
APO 76, U. S. Army

3 April, 1945

201 — Wade Frederick W. (Enl)

Subject — withdrawal of charges

To — 1st Lt. John R. Sennott, Jr. Hq. 76th Inf. Div., T J A of G. C. M. Aptd, by Par. 2 SO 59, Hq. 76th Inf. Div. 23 Mar. '45

1. The charges in the case of Pfc. Frederick W. Wade, 39208980, Co. K, 385th Inf. are hereby withdrawn from the general court-martial appointed by Par. 2, SO 59, this Hq. 23 March, 1945, and no further proceedings will be taken by said court in connection therewith.

2. The charges and allied papers will be returned to this Hq.

By command of Major General Schmidt.

/s/ George E. Norton, Jr.
George E. Norton, Jr.
Lt. Col. A.G.D.
Adjutant General

(Respondent's Exhibit B p. 200)

As thus submitted to it on the record of former trial, the letter of withdrawal and arguments and brief of counsel, the Fifteenth Army court-martial denied the plea of former jeopardy (R. 68-69). Petitioner thereupon pleaded not guilty, and upon conflicting evidence, three-fourths of the members concurring, the court-martial found petitioner guilty (R. 67-68). At this trial, as in the former trial,

members of the 385th Infantry testified for petitioner (R. 54-60). Petitioner was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life (R. 68).

Military Review.

Petitioner's case was reviewed pursuant to Articles of War 46, 10 U. S. C. A., Section 1517, and 50½, 10 U. S. C. A., Section 1522. The Fifteenth Army Staff Judge Advocate in an opinion recommended approval of the court-martial finding of guilty, but recommended the sentence be reduced to twenty years (R. 45-66). He contended that petitioner's plea in bar of trial had been properly overruled because the first trial had not been completed (R. 60-62). The Commanding General, Fifteenth Army, who had appointed the court-martial and had referred petitioner's case to it for trial, approved the finding of guilty but reduced the period of confinement to twenty years; and forwarded the record of trial to the Branch Office of the Judge Advocate General with the European theater for action (R. 68). In that office the case was assigned to Board of Review No. 4. In a unanimous opinion the Board held that petitioner's plea in bar should have been sustained and that the record of trial was legally insufficient to support the findings of guilty and sentence (R. 78, Par. 7). It held that the basis upon which the Fifteenth Army court-martial denied the plea in bar (that a soldier is not put in jeopardy until the court-martial trial is completed) was unsound, since jeopardy attaches under the Constitution of the United States prior to finding (R. 70-72, 76-78). This Board examined not only the record of trial upon which the Fifteenth Army court-martial denied the plea of former jeopardy, but it also examined and discussed the 4th and 5th indorsements to the

charge sheet by which the charges were in turn transmitted from the 76th Division to the Third Army, and from the Third Army to the Fifteenth Army (R. 69, 72-76). The meaning and effect of this 4th indorsement is now a material issue and is, therefore, set out.

AG 201-Wade, Frederick W (Enl) 4th Ind.
(19 Mar 45)

HQ 76TH INF DIV, APO 76, US Army, 3 Apr. 45.

TO: CG, Third US Army, APO 403, US Army.

1. The charges and allied papers in the case of *Pfc. Frederick W. Wade*, 39208980, Co. K, 385th Inf, are transmitted herewith with a recommendation of trial by general court-martial. The case was previously referred for trial by general court-martial and trial was commenced. Two witnesses, the mother and father of the victim of the alleged rape, were unable to be present due to sickness, and the court continued the case so that their testimony could be obtained. Due to the tactical situation the distance to the residence of such witnesses has become so great that the case can not be completed within a reasonable time.

2. The accused has been served with a copy of the charges. The third copy of the supporting papers is in the hands of the defense counsel and the same will be forwarded as soon as they are obtained from him.

3. The trial judge advocate obtained the name of Mrs. Anni Endt, a neighbor of the alleged victim, and it is believed that she can further identify the accused.

For the Commanding General:

/s/ George E. Norton, Jr.
George E. Norton, Jr.
Lt. Col. A.G.D.
Adjutant General

(RESPONDENT'S EXHIBIT B, page 42.)

The Board of Review found that the reason assigned in this indorsement for the withdrawal of the case and its transfer to the Third Army for trial did not establish existence of an emergent situation justifying the termination of the first trial under the doctrine of imperious necessity, since it determined that the adjournment of the first trial, the letter of withdrawal and the 4th indorsement meant no more than that the first trial was terminated by reason of the absence of witnesses (R. 72-76).

The Assistant Judge Advocate General dissented, holding, in effect, that the 4th indorsement established that the charges against petitioner were withdrawn by reason of imperious necessity and that, therefore, petitioner did not have the right to plead former jeopardy at the second trial (R. 79-86). His contention was that while the termination of a criminal trial in a civil court by reason of absence of witnesses cannot justify a second trial, the termination of a court-martial trial by reason of the absence of witnesses does justify a second trial on the ground of imperious necessity (R. 79-86).

Thereupon, the Commanding General U. S. Forces, European theater, issued general court-martial order No. 2 confirming petitioner's sentence (R. 8-10).

Findings and Judgment of the Trial Court on Habeas Corpus.

The trial court had before it the complete court-martial records, the pertinent parts of which have been stated above. It also heard the testimony of petitioner that he was without knowledge that his case was being or had been withdrawn from the 76th. Division court-martial until he was charged before the Fifteenth Army court-martial

(R. 43). The trial court found in substance the following facts on the issue of imperious necessity:

1. The absence of witnesses, rather than an emergency due to the tactical situation, was the reason for the withdrawal of the case from the 76th Division court (R. 25).

2. The Commanding General 76th Division did not find that a military situation existed requiring discontinuance of the trial before the 76th Division court (R. 24).

3. The Commanding General, 76th Division, did not find that a military situation existed requiring him to transfer the cause to a jurisdiction where military conditions permitted the production of witnesses whom the court-martial requested the Trial Judge Advocate to procure (R. 24).

4. The tactical situation was not the motivating reason for discharging the first court-martial from further proceedings in the case (R. 25).

The trial court specifically found the facts to be as shown in the holding of Board of Review No. 4, and the statement of facts set out in this holding was specifically adopted by the parties (R. 13). On May 9, 1948, the trial court entered judgment discharging petitioner on bond (R. 26).

On June 12, 1947, respondent filed a motion for reconsideration, praying that the court reconsider its decision and fix a time and place whereat respondent might submit additional evidence in proof of the facts alleged in the motion (R. 26-30). On July 10, 1947, the court denied this motion for want of jurisdiction (R. 31).

Proceedings in Court Below.

Respondent appealed from the judgment of the trial court, relying upon three points: the first, that peti-

tioner was not placed in double jeopardy in that the first trial, convened at Pfalzfeld, Germany, 27 March, 1945, was not complete, that the tactical situation then and there present due to the combat situation of the United States in a state of war prevented its completion; second, that the court-martial, by which petitioner was convicted, did not lack jurisdiction though the identical charge and specification had been previously submitted to another court-martial for trial and had been partially tried, but completion thereof prevented because of the tactical condition then and there present due to combat conditions of the United States in a state of war; and third, that the trial court erred in overruling the motion for reconsideration (R. I).

The court below (the Chief Judge dissenting), in effect, set aside the findings of the trial court and made the following findings upon which it based its decision and judgment of reversal:

1. The absence of witnesses was not the sole cause for the withdrawal of the case from the 76th Division court-martial (R. 101).

2. It is fairly clear that the withdrawal was based upon the tactical situation intervening and developing after the trial which made it infeasible to produce absent witnesses before the court-martial at its then location (R. 101).

3. The Commanding General 76th Division determined in the exercise of his sound discretion that the tactical situation made it necessary or advisable to withdraw the case from the 76th Division court-martial and to refer it to the Commanding General, Third Army, for trial before another court-martial (R. 101-102).

On September 7, 1948, it entered its judgment reversing the judgment of the trial court and remanding the cause

with directions to enter judgment denying the petition for the writ of habeas corpus, and remanding petitioner to the custody of respondent (R. 107). The Chief Judge of the court below, in his dissent, followed the trial court and determined that the sole reason for termination of the first trial was the inability of the prosecution to produce conveniently the absent witnesses and not because of the tactical situation or for any other reason which would justify application of the doctrine of imperious necessity (R. 103).

On September 27, 1948, petitioner filed his petition for rehearing in the court below (R. 109-127). On October 8, 1948, the court below denied the petition for rehearing, Honorable Orie L. Phillips, Chief Judge, dissenting (R. 128).

There is a total absence of proof of any character that the tactical situation or combat conditions prevented the completion of the trial before the 76th Division court-martial (R. 1-128).

There are statements in the record asserting such a contention. They were made by the Assistant Judge Advocate General on review (R. 85-86), and by counsel for petitioner (1) at the habeas corpus hearing in the trial court (R. 39-40), (2) in the motion for reconsideration filed in the trial court (R. 26-30), and (3) in the statement of points relied upon by appellant (R. 1). But the record is barren of any evidence to sustain such statements.

II.

STATEMENT OF THE JURISDICTION OF THIS COURT.

(a) Statutory Provision Believed to Sustain the Jurisdiction.

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254, Act of June 25, 1948, Chapter 646, Public Law 773, 62 Stat. ____.

(b) Date of the Judgment to Be Reviewed.

The judgment of the Court of Appeals for the Tenth Circuit reversing the judgment of the District Court discharging petitioner was entered on September 7, 1948 (R. 107). Petitioner filed his petition for rehearing on September 27, 1948 (R. 127). It was denied on October 8, 1948 (R. 128). The issuance of the mandate has been stayed pending this application for review (R. 128). This petition and the certified record are filed within ninety days from the date of the judgment sought to be reviewed (Title 28, United States Code, Section 2101, Act of June 25, 1948, Chapter 646, Public Law 773, 62 Stat. ____).

(c) Statement of Nature of the Case and Ruling of the Court of Appeals.

This is a habeas corpus case instituted by petitioner in the United States District Court to obtain release from the custody of respondent who held petitioner by color of a United States general court-martial order, confirming a court-martial conviction and sentence (R. 2-10).

The trial court discharged petitioner upon the ground his detention violated the Fifth Amendment of the Constitution in that petitioner had been twice tried for the

The majority of the Court of Appeals ruled that, although he had been twice tried for the same offense, petitioner was not subjected to double jeopardy in violation of the Fifth Amendment. It reversed the judgment of the trial court with directions to deny the writ of habeas corpus and remand petitioner to the custody of respondent (R. 97-102). The Chief Judge dissented (R. 102-106).

(d) Cases Believed to Sustain the Jurisdiction of This Court.

This court has assumed jurisdiction by certiorari to Courts of Appeals in recent habeas corpus cases, viz.:

Price v. *Johnston*, 334 U. S. 266, 92 L. Ed. 993.

Hunter v. *Martin*, 334 U. S. 302, 92 L. Ed. 1012.

III.

THE QUESTIONS PRESENTED.

(a) Does the judgment of the court below erroneously deny petitioner the protection of the Fifth Amendment of the Constitution?

(b) Does the judgment of the court below erroneously apply the doctrine of imperious necessity?

(c) Does the Commanding General, empowered to appoint a court-martial and to refer cases to it for trial, although not a part of the court, have the power, independent of the court, to withdraw a case from it on the ground of imperious necessity after jeopardy has attached and cause the accused to be tried anew without his consent without violating the Fifth Amendment of the Constitution?

(d) Can the existence of imperious necessity for the termination of a trial be established, so as to validate a

judgment rendered in a subsequent trial after denial of the plea of former jeopardy upon an erroneous theory and without any proof of imperious necessity, merely upon a showing that on the date the case was withdrawn from the court-martial who first heard it, the charges were transmitted from the 76th Division (whose commander appointed the first court-martial) to the Third Army with an indorsement signed by the Adjutant General for the Commanding General that the case was previously referred for trial by general court-martial and trial commenced, that the court continued the case for testimony of witnesses unavailable due to sickness, that due to the tactical situation, the distance to the residence of these witnesses had become so great that the case could not be completed within a reasonable time?

(e) Does the court below, an appellate court, have the right to reverse outright the judgment of the trial court, upon determination of issues of fact and law not presented to the trial court and not presented by appellant on appeal, namely, that the Commanding General determined that it was necessary or advisable to withdraw the case from the first court-martial, that he did this in the exercise of a sound discretion vesting in him, that such determination was sufficient to justify the subsequent trial without subjecting petitioner to double jeopardy in violation of the constitution?

(f) Did the court below err in setting aside findings of fact made by the trial court, based upon substantial evidence, which findings are not erroneous, and which, in any event, are not clearly erroneous?

(g) Does the judgment of the court below violate petitioner's right to have the validity of his conviction appraised upon consideration of the case as it was tried and as the issue of former jeopardy was determined by the trial court?

be reviewed and determined by this court, as provided by the statutes of the United States; and that the judgment of said Court of Appeals be reversed by the court, and your petitioner prays that the certified copy of the record and proceedings of said court, filed with this petition, may be treated as a return to said writ of certiorari, and your petitioner prays that he may have such other and further remedies in the premises as to the court may seem appropriate and in conformity with law.

Frederick W. Wade,
Petitioner.

R. T. Brewster,
907 Federal Reserve Bank Building,
Kansas City, Missouri,

N. E. Snyder,
210 Brotherhood Block,
Kansas City, Kansas,

Harry W. Colmery,
608 National Bank of Topeka Bldg.,
Topeka, Kansas,

Counsel for Petitioner.

sel, the Fifteenth Army court-martial denied the plea of former jeopardy (R. 68-69, 119-127). Petitioner thereupon pleaded not guilty, and upon conflicting evidence, three-fourths of the members concurring, the court-martial found petitioner guilty (R. 67-68). At this trial, as in the former trial, members of the 385th Infantry testified for petitioner (R. 54-60). Petitioner was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life (R. 68).

Military Review.

Petitioner's case was reviewed pursuant to Articles of War 46, 10 U. S. C. A., Section 1517, and 50½, 10 U. S. C. A., Section 1522. The Fifteenth Army Staff Judge Advocate in an opinion recommended approval of the court-martial finding of guilty, but recommended the sentence be reduced to twenty years (R. 45-66). He contended that petitioner's plea in bar of trial had been properly overruled because the first trial had not been completed (R. 60-62). The Commanding General, Fifteenth Army, who had appointed the court-martial and had referred petitioner's case to it for trial, approved the finding of guilty but reduced the period of confinement to twenty years; and forwarded the record of trial to the Branch Office of the Judge Advocate General with the European theater for action (R. 68). In that office the case was assigned to Board of Review No. 4. In a unanimous opinion the Board held that petitioner's plea in bar should have been sustained and that the record of trial was legally insufficient to support the findings of guilty and sentence (R. 78, Par. 7). It held that the basis upon which the Fifteenth Army court-martial denied the plea in bar (that a soldier is not put in jeopardy until the court-martial trial is completed) was unsound, since jeopardy attaches

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(a) The decision of the court below, in holding that the second trial did not subject petitioner to double jeopardy in violation of the Fifth Amendment of the Constitution has decided a federal question in a way probably in conflict with applicable decisions of this court, viz.: *Ex parte Nielsen*, 131 U. S. 176, 33 L. Ed. 118; *United States* v. *Perez*, 22 U. S. (9 Wheaton) 579, 6 L. Ed. 165; and has rendered a decision in conflict with a decision of another Court of Appeals, viz.: *Cornero* v. *United States*, (9th Circuit) 48 F. 2d 69, and has rendered a decision in conflict with other federal and state decisions on the same matter, viz.:

United States v. *Kraut*, 2 F. Supp. 16.
United States v. *Shoemaker*, 27 Fed. Cas. (No. 16279) 1067.
United States v. *Watson*, 28 Fed. Cas. (No. 16651) 499.
State v. *Richardson*, 47 S. Car. 166, 25 S. E. 220.
Allen v. *State*, 52 Fla. 1, 41 So. 593.
Pizano v. *State*, 20 Tex. App. 139, 54 Am. Rep. 511.
Baker v. *Commonwealth*, 280 Ky. 465, 132 S. W. 2d 766.
State v. *Grayson*, 156 Fla. 435, 23 So. 2d 484.
Mullins v. *Commonwealth*, 258 Ky. 529, 80 S. W. 2d 606.
State v. *Little*, 120 W. Va. 213, 197 S. E. 626.
See also dissenting opinion below of Phillips, Chief Judge (R. 102).

(b) The decision of the court below, in holding that the Commanding General, although not a part of a court-martial, has the power to determine, *ex parte*, independ-

ently of the court, when cases may be withdrawn from a court-martial without hazarding the defense of former jeopardy, has decided an important question of federal law which has not been but should be settled by this court.

(c) The decision of the court below emasculates the constitutional prohibition against double jeopardy and destroys this safeguard against the conviction of innocent persons and, unless reviewed, petitioner will be without remedy to avoid a grave miscarriage of justice.

(d) The court below, in setting aside the findings of the trial court, in making findings of fact upon speculative possibilities and suppositions unsupported by the record, based upon an unsworn, hearsay, *ex parte* communication of unknown authorship (the 4th indorsement) and in ruling the case on a different factual and legal basis than that upon which respondent prosecuted his appeal, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

(e) The decision of the court below, in determining the validity of petitioner's conviction by invoking and applying the doctrine of imperious necessity to the issue of double jeopardy although the court-martial which tried petitioner a second time did not consider this doctrine in ruling the issue of former jeopardy, is probably in conflict with the decision of this court, viz.: *Cole* v. *Arkansas*, 332 U. S. 834, 92 L. Ed. 429, and constitutes a denial of due process of law.

under the Constitution of the United States prior to finding (R. 70-72, 76-78). This Board examined not only the record of trial upon which the Fifteenth Army court-martial denied the plea of former jeopardy, but it also examined and discussed the 4th and 5th indorsements to the charge sheet (not introduced in evidence before the Fifteenth Army court-martial) by which the charges were in turn transmitted from the 76th Division to the Third Army, and from the Third Army to the Fifteenth Army (R. 69, 72-76). The meaning and effect of this 4th indorsement is now a material issue and is, therefore, set out.

AG 201-Wade, Frederick W (Enl) 4th Ind.[1]

(19 Mar 45)

HQ 76TH INF DIV, APO 76, US Army, 3 Apr. 45.

TO: CG, Third US Army, APO 403, US Army.

1. The charges and allied papers in the case of *Pfc. Frederick W. Wade*, 39208980, Co. K, 385th Inf, are transmitted herewith with a recommendation of trial by general court-martial. The case was previously referred for trial by general court-martial and trial was commenced. Two witnesses, the mother and father of the victim of the alleged rape, were unable to be present due to sickness; and the court continued the case so that their testimony could be obtained. Due to the tactical situation the distance to the residence of such witnesses has become so great that the case can not be completed within a reasonable time.

2. The accused has been served with a copy of the charges. The third copy of the supporting papers is in the hands of the defense counsel and the same will be forwarded as soon as they are obtained from him.

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[1]This document is paraphrased in the Board of Review opinion (R. 69). Omitting caption and signature, it is set out in the District Court opinion (R. 16, footnote). It appears at page 42, Respondent's Exhibit B, lodged with this court.

CONCLUSION.

Each of the questions presented is of grave public importance. The majority ruling directly affects the cause of human freedom under the Constitution of the United States. Unless the majority ruling below is reviewed, the law of double jeopardy will be left in confusion; and petitioner will be the victim of a new determination of facts in the appellate court without an opportunity to refute them.

The controlling facts were set out in the opinion of the Board of Review (R. 66), were adopted by the parties as an agreed statement of facts; and the trial court specifically found the facts to be as shown in the holding of the Board of Review (R. 13). The court below, however, disregarded these facts (R. 97) in derogation of accepted appellate practice, as expressed in Rule 52 (a); Federal Rule of Civil Procedure, 28 U. S. C. A. foll. Sec. 723 c.

The controlling decisions of this and other courts are aptly set out in the opinion of the Board of Review (R. 66), in the opinion of the trial court (R. 12) and in the dissenting opinion of the Chief Judge of the court below (R. 102).

Two additional points have arisen from the ruling of the court below which involve due process of law. The first trial in which petitioner was put in jeopardy was not terminated by the court-martial conducting the trial (R. 68). It was terminated by extra-judicial action, purportedly taken on behalf of the Commanding General without notice to petitioner and without his knowledge or consent and without an opportunity to be heard on that vital question (R. 68-69, 43). The Commanding General is a representative of the prosecution. He is not a part of the

court-martial. He is without power or discretion to terminate a case after jeopardy has attached without hazarding the constitutional defense of former jeopardy. The second point is that petitioner was convicted by the second court-martial upon the erroneous theory that it had jurisdiction because the first trial was terminated prior to final disposition of the case (R. 68, 60-62, 119-127) and now the court below has held that the second court-martial had jurisdiction upon the new theory that the Commanding General had the power to terminate the first trial without barring a second trial, if, in his discretion, he found it necessary or advisable to do so, and that he apparently did so find (R. 100-102). Had the prosecution taken this position in the second court-martial trial or had the respondent taken this position in the trial court, petitioner would have been afforded an opportunity to be heard and to introduce evidence upon these issues, establishing the true factual situation. Petitioner has been denied the presumption of acquittal in his first court-martial trial upon issues upon which he has had no chance to be heard. Petitioner has been denied safeguards guaranteed by due process of law. *Cole v. Arkansas*, 332 U. S. 834, 92 L. Ed. 429.

Such facts and controlling decisions make readily apparent the importance and necessity for granting the writ, and counsel for petitioner feel that further elaboration of them in a brief in support of this petition would be superfluous.

Wherefore petitioner prays that a writ of certiorari issue to the Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Court of Appeals, in the case numbered and entitled No. 3575, *Walter A. Hunter, Appellant*, v. *Frederick W. Wade, Appellee*, to the end that this cause may

States in a state of war; and third, that the trial court erred in overruling the motion for reconsideration (R. 1).

The court below (the Chief Judge dissenting), in effect, set aside the findings of the trial court and made the following findings upon which it based its decision and judgment of reversal:

1. The absence of witnesses was not the sole cause for the withdrawal of the case from the 76th Division court-martial (R. 101).

2. It is fairly clear that the withdrawal was based upon the tactical situation intervening and developing after the trial which made it infeasible to produce absent witnesses before the court-martial at its then location (R. 101).

3. The Commanding General 76th Division determined in the exercise of his sound discretion that the tactical situation made it necessary or advisable to withdraw the case from the 76th Division court-martial and to refer it to the Commanding General, Third Army, for trial before another court-martial (R. 101-102).

On September 7, 1948, it entered its judgment reversing the judgment of the trial court and remanding the cause with directions to enter judgment denying the petition for the writ of habeas corpus, and remanding petitioner to the custody of respondent (R. 107). The Chief Judge of the court below, in his dissent, followed the trial court and determined that the sole reason for termination of the first trial was the inability of the prosecution to produce conveniently the absent witnesses and not because of the tactical situation or for any other reason which would justify application of the doctrine of imperious necessity (R. 103).